Supreme Court, U.S.
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No. 95-279

(4)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WILLIAM T. ATKINS,
Petitioner,

v.

DEPARTMENT OF REVENUE, STATE OF OREGON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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September 20, 1995

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Petitioner respectfully invites the Court's attention to the Virginia Supreme Court's decision in *Harper v. Virginia Dep't of Taxation*, —— Va. ——, —— S.E.2d ——, 1995 WL 545828 (Sept. 15, 1995) (*"Harper III"*). The decision *in Harper III* underscores that the decision of the Oregon Supreme Court in the case at bar is in irreconcilable conflict with this Court's decision in *Reich v. Collins*, 115 S. Ct. 547 (1994). Unlike the court below, the Virginia Supreme Court rejected the Virginia Department of Taxation's assertion that "*Reich* is *inapplicable* here." *Harper III*, 1995 WL 545828, *4 (empha-

sis added).[1] Consistent with this Court's holding in *Reich*, the Virginia Supreme Court held that:

> If . . . we now adopt, for the first time, the Department's view that a refund is discretionary, we certainly will have done what the Supreme Court said in *Reich* a state may not do, that is "to reconfigure its scheme, unfairly, in midcourse—to 'bait and switch'."

Id. (*quoting Reich*, 115 S. Ct. at 550). The Oregon Supreme Court's adoption of the respondent's reconfigured scheme indisputably violated its obligation under the Supremacy Clause to give "*Reich* its full effect." *Id.* at *8.

The Virginia Supreme Court's decision in *Harper III* also establishes the widening conflict between the State courts of last resort. In *Harper III*, the Virginia Supreme Court properly reached the "inevitable conclusion that the Harper taxpayers are entitled to full refunds. *Harper III*, 1995 WL 545828, *8. In contrast, the court below, in order to avoid this inevitable result, defiantly chose instead to ignore the mandate of *Reich*.[2] Thus, review is necessary to resolve this conflict between the courts of last resort on this important federal question.

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[1] The position of the respondent adopted by the court below and and now replicated by the respondent in other pending *Davis*-related cases in Oregon is indistinguishable from that asserted by the Virginia Department of Taxation in *Harper III*. *See, e.g.*, Petition at 9.

[2] *See also General Motors Corp. v. Kansas City, Missouri*, U.S. No. 95-125 (petition for certiorari filed July 21, 1995).

CONCLUSION

For the reasons set forth above and in the petition for certiorari, Petitioner respectfully requests that his petition for certiorari be granted and the decision of the court below be reversed.

Respectfully submitted,

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OPPOSITION

BRIEF

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On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under *McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18 (1990), a State, through a pre-existing statute, may impose a one-year period of limitations on its liability to pay backward-looking relief for an unconstitutionally imposed tax.

2. Whether a State denies taxpayers due process where: (1) state law contains two arguably applicable statutes providing for refunds of taxes, one of which would provide retroactive relief for a one-year period and the other for a three-year period; (2) the state courts had not previously had the opportunity to declare which of the two arguably applicable limitations periods would apply to a particular class of claims; (3) the state court holds that the shorter of the two periods applies; and (4) the taxpayers cannot reasonably claim that they relied to their detriment on the more generous statute, because their reliance on the statute did not deprive them of the pre-existing remedy that applies to their claim.

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RESPONDENT'S BRIEF IN OPPOSITION

As many other States did for many years, Oregon taxed pensions paid to retired federal workers but exempted pensions paid to retired state workers. And in Oregon, as in many other States, this Court's decision in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989), spawned litigation by federal retirees seeking refunds of taxes paid in the years in which state retirees were exempt. The first case challenging that differential taxation to reach the Oregon Supreme Court was *Ragsdale v. Department of Revenue*, 312 Or. 529, 823 P.2d 971 (1992).[1] The state court resolved *Ragsdale* by striking down the state tax statute and applying a longstanding Oregon statute that imposes a one-year period of limitations for refund of taxes in cases in which tax laws are invalidated by the courts. The court reexamined and reaffirmed that decision in the case of which petitioner seeks review.

Petitioner asserts two main arguments against these two state court opinions. First, petitioner claims that the Oregon decisions fail to apply *Davis* retroactively as required by *Harper v. Virginia Dep't of Revenue and Fin.*, 509 U.S. ___, 113 S. Ct. 2510 (1993). That argument is based on misunderstandings both of *Harper* and of the operation of the statute the Oregon court applied in *Ragsdale*. The statute the state court applied is of a type this Court expressly approved in *McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18, 31 (1990), and itself provides backward-looking relief. Second, petitioner argues that the state court opinions lead to a result no different from the "bait and switch" tactic this Court condemned in *Reich v. Collins*, 513

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[1] An earlier case, *Nutbrown v. Munn*, 311 Or. 328, 811 P.2d 131 (1991), *cert. denied*, 502 U.S. 1030 (1992), failed to obtain substantive review of the question of remedy for federal retirees because the plaintiffs had bypassed available administrative review by the Department of Revenue.

U.S. ___, 115 S. Ct. 547 (1994) (*Reich III*).[2] Once again, petitioner misreads both this Court's opinion and the effects of Oregon law. The Court did not hold that a taxpayer's due process rights are violated any time the taxpayer does not obtain as large a refund as he expected based on his reading of state law. What the Court rejected was causing taxpayers to pass up an available remedy in justified reliance on the existence of an alternative route to that same refund, then closing that alternative route and leaving the taxpayer with no refund at all. Nothing like that happened here. To the contrary, Oregon awarded significant relief to a large class of federal retirees, including petitioner.

Because the state court's decision in this case is based on *Ragsdale* and because the petition for writ of certiorari consists in large measure of an attack on that opinion, the Department of Revenue (DOR) begins with a somewhat more complete description of the facts and reasoning of that opinion than petitioner has provided.[3] DOR then explains why the relief ordered in *Ragsdale* is fully consistent with due process and with *Harper* and not remotely analogous to the denial of relief rejected in *Reich III*.

1. The plaintiff in *Ragsdale* sought refund of back taxes paid for 19 years on her federal pension on the theory that the due process requirement of "meaningful backward-looking relief,"

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[2]This brief refers to all three *Reich v. Collins* opinions, two from the Georgia courts, *Reich v. Collins*, 262 Ga. 625, 422 S.E.2d 846, 849 (1992) (*Reich I*) and *Reich v. Collins*, 263 Ga. 602, 437 S.E.2d 320 (1993) (*Reich II*), as well as this Court's opinion, *Reich v. Collins*, 513 U.S. ___, 115 S. Ct. 547 (1994) (*Reich III*).

[3]Other than the *Ragsdale* opinion itself, the best guide to what the Oregon Supreme Court did in *Ragsdale* and why, is the court's painstaking opinion in this case, Pet. Cert. 1a-18a, which thoroughly reconsiders and reexamines the history and analysis applied in *Ragsdale*.

McKesson, 496 U.S., at 31, mandated refund of all taxes ever paid under the invalid state law. Alternatively, she sought refund of back taxes paid for three years under OR. REV. STAT. §§ 305.270 and 314.415, Oregon's general refund statutes. DOR responded there, as it did here, that *McKesson* expressly approves restrictions on state refund obligations imposed by pre-existing procedural requirements, such as short statutes of limitations, and that Oregon has had just such a restriction for as long as it has had the general refund statutes on which the taxpayer relied. That restriction is found in OR. REV. STAT. §§ 305.765 through 305.785, which govern refunds of taxes when a tax law is declared invalid.[4] OR. REV. STAT. § 305.765 expressly provides that when a tax law is declared invalid, the state shall refund taxes paid or collected under the invalidated law in and after the year in which the action attacking the validity of the law is initiated. OR. REV. STAT. § 305.780 expressly declares that these sections do not authorize refund of any taxes paid under the invalidated law in years prior to the year in which the action attacking the invalidated law is initiated. The plaintiff in *Ragsdale* argued, as does petitioner, that OR. REV. STAT. § 305.765, by its terms, applies only when "there is no other statute authorizing a refund" of the taxes in question. Because the general refund statute authorized a refund, they reasoned, OR. REV. STAT. § 305.765 could not apply.[5]

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[4]OR. REV. STAT. §§ 305.765 through 305.780 are found at pages 41a and 42a of the petition for certiorari. OR. REV. STAT. § 305.785 appropriates funds to pay the refunds ordered by those sections.

[5]DOR refers to OR. REV. STAT. §§ 305.270 and 314.415 as the "general refund statutes" and to OR. REV. STAT. §§ 305.765 through 305.785 as the "invalidation refund statutes." In a sense, though, it might be more precise to describe the invalidation statutes as simply providing a remedy for an

(continued...)

The Oregon Supreme Court held that the invalidation refund statutes, not the general refund statutes, applied. As it did in this case, the court traced the history of the two sets of laws, explaining that their predecessors were enacted by the 1931 Oregon Legislature in response to a pointed historic lesson. In 1930, the Oregon Supreme Court struck down a state tax on intangibles. *Redfield v. Fisher*, 135 Or. 180, 204, 292 P. 813 (1930). The tax commission asked the Attorney General about its liability to refund revenue collected under the invalid tax. The Attorney General advised that refunds could be made only under a provision of the law that authorized the Commission to retain $1,000 as a working balance from which to make refunds of amounts paid by taxpayers in excess of the taxes they were legally required to pay. 15 Op. Att'y Gen. 34 (1930); 15 Op. Att'y Gen. 35 (1930). The 1931 Legislative Assembly responded by enacting, *inter alia*, Oregon Laws 1931, ch. 229 (the precursor to OR. REV. STAT. §§ 305.270 and 314.415, the general refund statutes) and Oregon Laws 1931, ch. 337 (which became what are now OR. REV. STAT. §§ 305.765 to 305.785, the invalidation refund statutes).[6]

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[5](...continued)

invalid statute rather than to characterize that remedy as a refund. As described in the text, the remedy differs from a standard refund in that taxpayers are not required to apply to receive the return of taxes paid once the court of last resort determines that the tax is invalid.

[6]Petitioner takes unspecific issue with this history, claiming that a 1940 Opinion of the Attorney General demonstrates that it "simply is not so[.]" Pet. Cert. 18, citing 19 Op. Att'y Gen. 577 (1940) (reproduced at Pet. Cert. 43a through 46a). Petitioner is demonstrably wrong. The opinion he cites was issued in response to *Meredith v. State Tax Comm'n*, 163 Or. 305, 96 P.2d 1082 (1939), upon which petitioner also relies. In *Meredith*, however, the Oregon Supreme Court was not called upon to declare any tax law invalid and did not do so. Rather, the court concluded that the State Tax

(continued...)

Relying on this history and on the principle that a court should not read a general statute so broadly that it will nullify a more specific statute enacted in the same legislative session, *Daly v. Horsefly Irrigation District*, 143 Or. 441, 446, 21 P.2d 787 (1933), the *Ragsdale* court concluded that the general refund statutes cannot apply when a tax law is invalidated. *Ragsdale*, 312 Or., at 536–37. The court reasoned that if the general refund statutes apply when a tax law is invalidated, "it would have been unnecessary to enact what is now [OR. REV. STAT. §] 305.765" because the general refund statute would *always* apply and there would never be a situation in which "there is no other statute authorizing a refund." 312 Or., at 537. The court concluded that excluding the contemporaneously enacted general refund statutes from the meaning of this limitation on the invalidation refund statutes is the only reading that permits the invalidation refund statutes to have effect. *Ibid.* The court re-examined and reaffirmed that history and that analysis in this case. Pet. Cert. 6a–12a.[7]

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[6](...continued)

Commission, the predecessor to DOR, erroneously construed a state statute and therefore erroneously failed to exempt income from the tax. 163 Or., at 310–13. When the Attorney General opined that "[b]ecause of [their] limited application [the invalidation refund statutes do] not seem material in this connection," Pet. Cert. 43a–44a, he was noting only that no law had been invalidated in *Meredith*.

[7]Petitioner disregards this bedrock principle of statutory construction. He asserts that the Oregon court reached its result by "ignoring the express provisions of [the general refund statute]" and omitting the provision of the invalidation refund statute that states that it applies only when no other statute provides for a refund. Pet. Cert. 17. To the contrary, as demonstrated in the text, *Ragsdale* expressly considered the language of both statutes and harmonized them to give effect to both. The court did the same here. *Atkins*, 320 Or., at 722–23 (Pet. Cert. 11a–12a). To suggest that the court simply ignored any of the language of either statute is convenient to

(continued...)

The *Ragsdale* court then turned to the portion of the statute requiring refunds for all taxes collected or paid under the invalidated statute "in or after the year in which the action attacking the validity of the [statute] is instituted." DOR argued that since Mrs. Ragsdale had not commenced her action in the Tax Court until 1990, she could not claim a refund of taxes paid in 1988 or 1989. The Oregon Supreme Court disagreed on two grounds. First, the court noted that in *Nutbrown v. Munn*, 311 Or. 328, 811 P.2d 131 (1991), *cert. denied*, 502 U.S. 1030 (1992), it held that the taxpayer must first pursue a refund from DOR before filing in the tax court. Reasoning that requiring initial resort to DOR gives DOR rather than the taxpayer control over the date that judicial action may be initiated, the court concluded that the limitations period in OR. REV. STAT. § 305.765 commences when the taxpayer initiates the administrative proceeding. 312 Or., at 538. Second, the court pointed out that Mrs. Ragsdale's 1988 taxes were not due to be paid until April 15, 1989. Her initiation of the administrative process in

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[7](...continued)

petitioner's thesis, but plainly inaccurate.

The court's reasoning also refutes the alternative effort to harmonize the two statutes offered by amicus The Retired Officers Association (TROA) . TROA argues that the invalidation refund statutes may be read to provide refunds to those taxpayers who failed to apply under the general refund statutes within the period of limitations. TROA Am. Br. at 6-7. That reading might be plausible if OR. REV. STAT. § 305.765 were written in terms addressed to individual taxpayers who no longer had a remedy. The pertinent language, however, refers to the absence of another statute authorizing a refund. The general refund statutes authorize refunds. That a taxpayer does not timely apply does not mean that "there is no other statute authorizing a refund." TROA's reading would also lead to disparate results, with some taxpayers receiving refund of three years' taxes and others only one. The Oregon Supreme Court's construction, in addition to being consistent with the language of the law, provides results consistent with the class-type relief mandated by the invalidation refund statutes.

1989 therefore entitled her to a refund of the 1988 taxes on her federal pension. Refund of her 1989 taxes followed from the statute's requirement to return taxes paid "in *or after*" the year in which the action is begun. The court also concluded that because the invalidation refund statutes themselves provide backward-looking relief, the court was not required to decide whether federal law required *Davis* to be applied retroactively. 312 Or., at 533-34.[8]

The plaintiff in *Ragsdale* was not the only federal retiree to benefit from the court's holding. The invalidation refund statutes put the burden on the State to identify everyone who paid the tax under the invalidated statute and to refund any tax paid or collected during or after the year in which the invalidating action was filed. OR. REV. STAT. § 305.770. In contrast, the general refund statutes require the taxpayer to take the initiative and file for a refund. Because the invalidation refund statutes provide a form of class relief to all taxpayers who paid under the invalidated law, DOR issued over 58,000 refunds totalling more than $48,000,000 to federal retirees for the taxes paid on their pensions in 1988 and 1989.

2. Petitioner argues that Oregon has refused to give "full retroactive effect" to *Davis* in violation of the Court's later decision in *Harper*. In *Harper*, as it had done in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ___, 111 S.Ct. 2439 (1991), the Court held that when it applies a rule of federal law to the parties before it, "that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless

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[8]This Court decided *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ___, 111 S.Ct. 2439 (1991), which affected the rules by which retroactivity of the Court's decisions is determined, while *Ragsdale* was under review.

whether those events predate or postdate our announcement of the rule." *Harper*, 113 S. Ct., at 2517. The Virginia court had concluded that it should apply the rule of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), because this Court had not expressly stated in *Davis* that the rule it announced applied retroactively to the parties to that case. The Court disagreed and stated that when it does not expressly reserve the question of retroactivity, its opinions, *Davis* included, should be understood to have followed "'the normal rule of retroactive application.'" *Harper*, 113 S. Ct., at 2518 *quoting Beam*, 111 S. Ct., at 2445 (opinion of Souter, J.).

Harper unambiguously establishes that state courts must give the substantive rule announced in *Davis* full retroactive effect. It does not, however, determine the remedy that a State must afford for that violation of federal law. The Court in *Harper* declined to order any specific remedy but, rather, remanded to the state courts to fashion a remedy consistent with the due process principles it had most recently described in *McKesson*. *Harper*, 115 S. Ct., at 2519–20.

McKesson holds that States may protect themselves against the potentially disastrous economic consequences of having to refund all the money ever collected under an invalidated tax law. To be sure, due process requires States to provide meaningful backward-looking relief if they do not provide a predeprivation opportunity to avoid paying disputed taxes. *McKesson*, 496 U.S., at 36–39. But due process also permits States to enact reasonable procedural limitations on refund actions, so long as those limitations precede the invalidation of the law. In *McKesson*, the Court interpreted a part of the Florida court's reasons for its refusal to provide a remedy for taxes already paid as "bespeak[ing] a concern that a State's obligation to provide

refunds for what later turns out to be an unconstitutional tax would undermine that State's ability to engage in sound fiscal planning." 496 U.S., at 44. This Court responded by explaining that States could protect themselves from the potentially devastating effects of having a broadly applicable tax law invalidated by imposing reasonable "procedural requirements on actions for postdeprivation relief[.]" *Id.*, at 45; *see also Reynoldsville Casket Co. v. Hyde*, 514 U.S. ___, 115 S. Ct. 1745, 1750 (1995) (explaining application of *McKesson* to pre-existing, separate, independent remedial rules). Among the procedural requirements *McKesson* specifically enumerated as within a State's ability to enforce consistent with the requirements of due process are "relatively short statutes of limitations applicable to such actions[.]" *McKesson*, 496 U.S., at 44. That is precisely what the Oregon legislature created in 1931 when it enacted the invalidation refund statutes which impose a one-year period of limitations on refund claims arising from the invalidation of a tax law. As the Oregon Supreme Court explained: "If an action attacking the validity of the tax is not instituted within the year following its assessment (*viz.*, the year in which it is due and payable in this case), no refund may be made." *Atkins v. Dept. of Rev.*, 320 Or. 713, 726, 894 P.2d 449 (1995) (Pet. Cert. 16a). Petitioner's persistent references to "*novelty* in procedural requirements," *e.g.*, Pet. Cert. 9 (emphasis by petitioner), are, thus, persistently wide of the mark. Oregon has simply applied a longstanding statute of the type that this Court expressly approved in *McKesson*.[9]

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[9]The amicus brief of Tax Executives Institute (TEI) has more literary than legal merit. The brief is, in Macaulay's words, "all sail and no anchor." Letter to H.S. Randall (May 23, 1857). For example, TEI pretends

(continued...)

Petitioner incorrectly claims that the Court "specifically identified the court below as one of several state courts that had 'refused to accord full retroactive effect to *Davis* as a controlling statement of federal law.'" *See* Pet. Cert. 3; Pet. Cert. i (Question Presented No. 1). In the footnote accompanying the statement petitioner quotes, *Harper* cites the decision of the Oregon *Tax Court* as having declined to apply *Davis* retroactively. 113 S. Ct., at 2515 n 6 *citing* "*Ragsdale v. Department of Revenue*, 11 Or. Tax 440 (1990) aff'd on other grounds, 312 Or. 529, 823 P.2d 971 (1992)." In fact, the Oregon Supreme Court's decision affirmed the tax court in part and reversed it in part. *Ragsdale*, 312 Or., at 542. As previously described, the Oregon Supreme Court ordered retroactive relief under OR. REV. STAT. § 305.765 without waiting to be told that *Davis* applied retroactively.

Petitioner also argues that the decision in this case conflicts with a decision of the Florida Supreme Court. Pet. Cert. 9–10. That is a remarkable assertion inasmuch as the Florida court obviously was not interpreting the Oregon statutes at issue here. Rather, the court was considering the State of Florida's appeal from a trial court decision holding that a state tax on motor vehicles purchased outside of Florida violated the federal constitution. The State argued that applicable refund statutes barred the action. With little analysis, the Florida court concluded that the reasons proffered by the State provided no basis on which to bar a federal constitutional claim. *Department of*

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[9](...continued)

that no refunds were actually paid to petitioner and other federal retirees under *Ragsdale* and ignores those parts of *McKesson* that address the ability of the states to protect themselves against the crushing economic burden of having to refund all tax money ever collected under a broad scale tax law invalidated after many years application.

Revenue v. Kuhnlein, 646 So.2d 717, 721 (Fla. 1994). It is not clear from the court's opinion whether it was holding that the reasons presented by the State could not bar an action to declare the tax invalid or could not bar the remedy the taxpayers sought. If the court was addressing the former, there is no conflict because neither DOR nor the Oregon Supreme Court denies that the substantive rule announced in *Davis* and applied in *Harper* applies with equal force to Oregon.[10] As discussed above, the issue here is the remedy to be provided. If *Kuhnlein* is read as holding that a State may not apply pre-existing procedural rules that limit the relief afforded once a tax statute is declared unconstitutional, it is incorrect.

3. Petitioner's central thesis is that what the Oregon court did here is essentially indistinguishable from what the Georgia court did in its two *Reich* cases. *Reich v. Collins*, 262 Ga. 625, 422 S.E.2d 846, 849 (1992) (*Reich I*) and *Reich v. Collins*, 263 Ga. 602, 437 S.E.2d 320 (1993) (*Reich II*). *See* Pet. Cert. 8–9, 12–19. Petitioner claims, in effect, that to protect the state treasury, the Oregon court created a new rule to foreclose taxpayers from receiving their just due. That claim fails whether one compares what the Georgia and Oregon courts actually did or the results for the affected taxpayers. Where the Georgia court simply rewrote a statute out of concern about the economic consequences of applying it as written, the Oregon court applied a pre-existing and controlling statute after careful examination of the text, context and history of both the general refund statutes

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[10]Petitioner mischaracterizes a trial memorandum when he asserts that Oregon does not view itself as bound by this Court's decisions. Pet. Cert. 9. The portion of the memorandum he quotes makes the unremarkable assertion that Oregon trial courts are bound by the decisions of the Oregon Supreme Court.

and the invalidation refund statutes. Where Georgia taxpayers were misled into foregoing available process and thereby deprived of any remedy, no Oregon taxpayer gave up or was led to bypass either the process or the remedy to which he or she was entitled.

The Georgia court's *ipse dixit* conclusion that the state refund statute did not apply when a tax law was invalidated was not based on an alternative governing statute, on the history of the refund statute or on any principle of law or of statutory construction. Rather, as the opinion makes clear, the court based its result on its concern that, to promote stable government, the State needs to be able to rely on the laws under which it collects taxes. *Reich I*, 422 S.E.2d, at 849. In other words, the court judicially amended the statute to prevent the economic consequences of having to refund the taxes collected under the invalidated statute.

This Court's cases stand for the proposition that while States legitimately may protect themselves from the financial consequences of the invalidation of a tax statute, they must do so before the statute is struck down. This Court acknowledged in *McKesson* that preventing the economic disruption that might follow from the need to refund all money ever collected under an invalidated tax law is a matter of legitimate governmental concern. *McKesson*, 496 U.S., at 50. It is, however, a concern that the State must address prospectively. *Id.*, at 45; *id.*, at 28 n.4 (State may invoke, as an independent basis for refusing to provide a refund, failure to comply with a notice requirement "that was in effect at the time of petitioner's tax payments."); *Reynoldsville Casket Co.*, 115 S. Ct., at 1750 (explaining *McKesson*'s application to "pre-existing" remedial limitations). A State may, as Oregon did, create a protective rule that applies to cases arising after its enactment; it may not, as Georgia

attempted to do, create such a rule only after the tax law has been found invalid. In 1931 the Oregon legislature created a protective limitation precisely of the sort approved in *McKesson*. In 1992 the Oregon Supreme Court applied that limitation according to its terms. The Georgia court, by contrast, attempted to fashion its protective rule only after the fact. The actions of the two courts are not comparable.

When viewed from the perspective of its results for the affected taxpayers, the Oregon court's action is, again, dramatically different from the result in Georgia. Simply put, unlike what occurred in Georgia, no Oregon taxpayer changed his or her position for the worse in reliance on allegedly misleading information from the State. As the Court has explained, when the question is payment of taxes, a State may provide only predeprivation process to challenge a tax, only postdeprivation process, or both. *Reich III*, 115 S. Ct., at 550. Before the decision in *Reich I*, Georgia appeared to hold out to its taxpayers a hybrid system that gave them an unrestricted choice between challenging the tax before paying (predeprivation) or paying first, then challenging afterwards (postdeprivation). *See Reich III*, 115 S. Ct., at 550. As the Court also explained, States generally encourage taxpayers to pay first and litigate later. *Id.*, at 551. In *Reich I*, however, the Georgia court concluded that the postdeprivation process was not available where the claim was that the statute under which the tax had been collected was invalid. 422 S.E.2d, at 849. The result was to remit those taxpayers who had accepted the invitation to use the postdeprivation remedy to a predeprivation process that was no longer available to them because they had already paid the tax. Thus, those taxpayers who justifiably relied on the availability of postdeprivation process could obtain no remedy at all. As this Court explained, the

interaction of the Georgia court's two decisions denied both process and remedy to those taxpayers who had foregone the predeprivation procedure in justified reliance on the availability of a postdeprivation claim. 115 S. Ct., at 550–51.[11]

The Court's reference to "bait and switch" tactics and its use of the phrase "justified reliance" in *Reich III*, the latter of which was taken from Justice Harlan's opinion in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457–58 (1958), suggest, as does the result reached by the Court in both cases, principles of equitable estoppel. That suggestion is underlined by the Court's description of Georgia's actions as reconfiguring its remedial scheme "unfairly, in *midcourse*[.]" *Reich III*, 115 S. Ct., at 550 (emphasis by the Court). In effect, the Court concluded that having led taxpayers to believe that they would be entitled to seek postdeprivation relief, the State could not then deny that relief to a taxpayer who may have "change[d] his position for the worse" in reliance on the representation that postdeprivation relief would be afforded. *See Heckler v. Community Health Services*, 467 U.S. 51, 59 (1984) (describing elements of equitable estoppel). The essence of estoppel is that the person asserting the estoppel has been deprived of something to which she could lay a legitimate claim (the predeprivation remedy) by another's false

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[11]State and federal law create a host of situations in which a litigant is confronted with a procedural fork in the road and must make the choice of which fork to take at his or her peril. In most of those cases, that litigant is on notice that taking the right path is critical to succeeding. That litigants must sometimes take a calculated risk in selecting between, for example, a tort action or an administrative remedy does not give rise to a due process violation if the courts later clarify the law and announce that the litigant made the wrong choice. Nor was that the source of the problem in *Reich III*. The Georgia court's decisions failed to provide due process because, *inter alia*, no reasonable taxpayer could have been on notice before *Reich I* that the choice between predeprivation and postdeprivation relief was significant in terms of the ultimate ability to obtain a refund.

representation (the availability of the postdeprivation remedy).[12] Those Georgia taxpayers who passed up the predeprivation process in justified reliance on the availability of the post-deprivation process were left with no process and, hence, no remedy. Although the Court relied on due process rather than estoppel principles, the similarity of reasoning is apparent.

Petitioner is unspecific about how he or any other taxpayer in Oregon was or could have been misled into changing his or her position for the worse in reliance upon the belief that the general refund statute would apply here. That is understandable because, unlike the situation presented in *Reich III*, the choice of which refund procedure to pursue did not cause any taxpayer to change his or her position in a way that deprived that taxpayer of either a process or a remedy to which he or she was otherwise entitled.

There are only two ways in which reliance on the general refund statute theoretically could have caused petitioner to change his position for the worse here. First, as in *Reich III*, the taxpayer could have bypassed available predeprivation relief and found himself effectively denied a greater remedy than was awarded by the *Ragsdale* decision. Second, the taxpayer could have delayed filing for a refund in reliance on the three-year period of limitations in the general refund statutes.

Neither of those results occurred here. First, Oregon has no predeprivation remedy. To obtain judicial review, the taxpayer must pay the tax. OR. REV. STAT. § 305.419; *Atkins v. Depart-*

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[12]The point is not, as TROA apparently believes, that a State violates the principles described in *Reich III* unless the average taxpayer can understand all the intricacies of the tax code. *See* TROA Am. Br. at 6–7. It is, rather, that the state may not mislead that taxpayer into giving up that to which he or she would have been entitled if not misinformed.

ment of Revenue, 320 Or., at 725–26 (Pet. Cert. 15a). As a result, no one bypassed an available predeprivation remedy (or any other purportedly available remedy) in reliance on what later proved to be a mirage. The second possibility is, as a practical matter, highly unlikely. Where a taxpayer has paid taxes for several years under a statute that he now claims is invalid, the existence of any period of limitations, whether it be one year or three, places a premium on filing at the earliest possible date. If petitioner had reason to believe that he was entitled to a refund of taxes paid on his federal pension and if, as reason and his pursuit of this litigation suggest, his motive was to maximize his refund, he had precisely the same incentive to file at the earliest possible date no matter what limitation period he may have thought was applicable. In either case, to maximize his refund he must file at the earliest possible date. Similarly, if the taxpayer is seeking to invalidate a statute, he must also file at the earliest date to limit his future liability to pay the tax. Thus, petitioner could not credibly contend that he delayed filing for a refund in reliance on a mistaken belief that the longer period of limitations applied.

The truth, of course, is that petitioner claims none of the above. His complaint is simply that he thought he was entitled to get a refund under the longer period of limitations and *Ragsdale* holds that he is not. To be sure, that holding made his refund smaller than he wishes it had been. That, however, is hardly a violation of due process. It is simply the application of a controlling statute in the manner in which it was designed to be

applied.[13] The State did not cause petitioner to change his position for the worse in reliance on some apparently available remedy, then unforeseeably snatch that remedy away and leave him with no relief. To the contrary, the Oregon court applied a longstanding statute that it had not previously been called upon to construe and provided petitioner and a large class of other federal retirees with a substantial remedy. Thus, whatever other States may be doing, *see* Pet. Cert. 8, Oregon has done at least as much as the Court has said that it must. That is, Oregon has provided a meaningful, backward-looking remedy to taxpayers who paid taxes found unconstitutional in *Davis*. Arguably, it has done more by providing refunds to taxpayers who did not apply for them.[14] Petitioner has had the full benefit of that remedy as have thousands of other federal retirees.

4. Because no federal retiree suffered any harm from his or her purported reliance on state law or officials, it should not be strictly necessary to respond to petitioner's claims of misinformation. Pet. Cert. 12–16. Nevertheless, because of the implications of the arguments asserted by petitioner and his amici, DOR addresses them briefly.

Petitioner cites four cases which, he asserts, establish "an unbroken line of precedent spanning over six decades" recognizing the right of taxpayers to obtain refunds and interest under the

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[13]TEI describes the invalidation refund statutes as "obscure." TEI Am. Br. at 12. It seems unlikely that TEI truly means to suggest that due process as applied in *Reich III* commands state courts to ignore a controlling statute simply because it is less well-known than another statute on the same general subject.

[14]It would be an odd rule that permitted a State to limit refunds to three years and require taxpayers to apply for them but prohibited it from providing the more uniform and broader, if shallower, relief afforded by the invalidation refund statutes.

general refund statutes when a tax law is declared unconstitutional. They are: *Meredith v. State Tax Comm'n*, 163 Or. 305, 96 P.2d 1082 (1939); *Smith, Kline & French Lab. v. State Tax Comm'n*, 241 Or. 50, 403 P.2d 375 (1965); *Wood v. Department of Revenue*, 305 Or. 23, 749 P.2d 1169 (1988); and *Borg v. Department of Revenue*, 308 Or. 34, 774 P.2d 1099 (1989). None of these cases holds that the general refund statutes apply when a tax law is invalidated.

In neither *Meredith* nor *Smith, Kline & French* was the Oregon Supreme Court called upon to declare a tax law invalid nor did it do so. Rather, in each case the court concluded that the State Tax Commission, predecessor to DOR, erroneously construed a state statute and therefore erroneously failed to exempt income from the tax. In other words, rather than hold a tax law invalid (the event that would trigger the application of OR. REV. STAT. § 305.765), the court held only that the tax commission had erroneously applied a statute to deny the taxpayer an exemption. As a result, in neither case were the invalidation refund statutes implicated.

Wood and *Borg* are similarly unhelpful to petitioner's contentions. While it is true that both cases ordered relief for the complaining taxpayer, neither specified the statute determining the extent of that relief. Specifically, neither the opinions of the Oregon Supreme Court nor the opinions of the Oregon Tax Court cite either the general refund statutes or the invalidation refund statutes in either case. *See Borg v. Department of Revenue*, 11 Or. Tax Rep. 67, 73 (1988) (ordering DOR to recalculate the taxpayer's income tax liability "in accordance with this opinion" without specifying the statutory basis for that order); *Wood v. Department of Revenue*, 10 Or. Tax Rep. 374 (1987). In *Wood*, the Oregon Supreme Court remanded the case to DOR "for

further proceedings consistent with this opinion" without specifying what that relief should be. *Wood*, 305 Or., at 33. *Borg* affirmed the judgment of the tax court without specifying the relief the taxpayer was to receive.

Petitioner places particularly heavy reliance on the Oregon Supreme Court's opinion in *Nutbrown v. Munn*, which petitioner reads to hold that taxpayers may pursue *Davis* refunds under the general refund statutes. Pet. Cert. 15–16. That reading of *Nutbrown* is patently unfounded.

The only issue before the court in *Nutbrown*, and the only issue the court purported authoritatively to *decide*, was whether federal retirees could pursue damages, injunctive or other tort-like relief in the form of an action under 42 U.S.C. § 1983, without first presenting their challenge through the administrative review process. The answer to that question depended, in turn, on whether they had remedies available to them through state administrative procedures. In concluding that the Oregon administrative process provides taxpayers with a forum for their claims, the Oregon Supreme Court left open precisely what form that remedy would take and how extensive it would be. It declared only that "[a]dministrative remedies available to the Taxpayers include a request for declaratory and injunctive relief, as well as for refunds" and, as in *Wood* and *Borg*, it nowhere identified under what statutes taxpayers would or should proceed. *Nutbrown v. Munn*, 311 Or., at 342. When *Nutbrown* was decided, the retroactivity of *Davis* appeared to many lower courts, including the Oregon court, to be an open question. The court, therefore, had no occasion to determine what specific remedy might be available because the court was not convinced that federal retirees were entitled to any remedy. Accordingly, when the plaintiffs in *Nutbrown* urged that the administrative

process would be futile because the state was denying any obligation to pay refunds for any tax year before 1989, the court responded: "The retroactivity of *Davis* (if it is otherwise controlling) doubtless will be an interesting issue. Certainly, however, the fact that this question is waiting in the wings does nothing to illustrate any futility to the administrative process." *Id.*, at 347. Beyond that, the court merely made it clear in the passage on which petitioners rely that the administrative process might well provide federal retirees with all relief that the constitution entitles them to receive.[15] In short, rather than provide a basis for petitioner's reliance on the general refund statute, *Nutbrown* instead should have served to place petitioner and other taxpayers on notice that the issue of what precise remedies for federal retirees could be obtained through state

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[15]Specifically, the court stated: "But the Department *can* (and may) give Taxpayers all the relief Taxpayers claim they are entitled to under an appropriate, constitutional reading of the Oregon tax system." *Nutbrown v. Munn*, 311 Or., at 345 (emphasis in original). For petitioners to interpret this as a *holding* that taxpayers may pursue their claims under the general refund statutes is purely wishful thinking on their part. The plaintiffs in *Nutbrown* were not claiming an entitlement to refunds under the general refund statutes, nor under any other state statutory source. They were demanding federal tort relief. The court rejected the argument because it concluded that plaintiffs could pursue administrative remedies generally. The court recognized that the nature of those remedies might turn, at least in part, on what constitutional remedy was required, because the court's settled methodology is to construe statutes to meet constitutional requirements wherever possible. *E.g.*, *Oregon State Police Assn. v. State of Oregon*, 308 Or. 531, 537-39, 783 P.2d 7 (1989) *cert. denied* 111 S. Ct. 44 (1990). Indeed, in a later portion of the opinion, the court expressly acknowledged that if the available administrative remedies, even given the best possible construction, fell short of providing all relief constitutionally due to the taxpayers (such as the punitive damages the plaintiffs claimed), then in fact relief under section 1983 might be warranted. *Nutbrown v. Munn*, 311 Or., at 346. That the court was leaving for another day the question of what precise administrative remedies might apply, and how they would be construed in light of federal constitutional requirements, is plain from its full discussion.

administrative or judicial proceedings was an open question and remained for resolution.

Petitioner next tries to make a case for justifiable reliance on the general refund statutes by pointing to the positions taken by the Oregon Attorney General in the course of the *Nutbrown* litigation (litigation to which petitioner was not even a party). Specifically, petitioner relies on illustrations in appellate briefs in *Nutbrown*. As already discussed, the only issue in *Nutbrown* was the availability of an action under section 1983 in advance of pursuing whatever administrative remedies were available to the taxpayers. The question of which precise administrative remedy would apply was not before the court, and neither the court nor the parties had the occasion to examine it decisively.

Nevertheless, it is true that in the appellate briefing in *Nutbrown*, counsel for the state urged that administrative processes were available, and pointed specifically to the general refund statutes. In doing so, the state's briefing overlooked the more relevant and, as it would prove, controlling statute.[16] That can hardly be a basis on which petitioner can claim "justifiable reliance" on the general refund statutes. Even assuming that petitioner actually relied on the state's briefing (a claim that

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[16]As discussed next, at the same time that the state's appellate counsel pointed in the *Nutbrown* briefing to the general refund statutes to illustrate the administrative remedies, the state's general counsel attorneys had formally concluded and had officially advised the legislature that the invalidation statute properly would be the source of the remedy for taxes unconstitutionally collected under *Davis*. Although this office strives to avoid inconsistencies in its legal views or opinions, that is not always possible in an institution of this size. The difficulty of coordinating legal positions on these questions was aggravated by the fact that in *Nutbrown*, the question of what exact administrative remedies taxpayers were entitled to pursue was not an issue in the case, so that the direct advice being given by general counsel attorneys on that question was not called to appellate counsel's attention.

petitioner never in fact makes[17]), several factors would have made that reliance unreasonable: (1) the precise source or scope of available administrative remedies was not directly at issue in *Nutbrown*; (2) the Oregon Attorney General's legal position was not put before the court as a definitive or binding statement of the exact statutory remedies available to taxpayers, but to point to the availability of administrative relief generally; (3) the Oregon Attorney General's opinions are opinions only, they do not have the force and effect of law and they are not the law; private citizens and their attorneys must still consult the statutes enacted by the state's legislature. *Cf. In Re Sawyer*, 286 Or. 369, 381, 594 P.2d 805 (1979) (Attorney General opinions do not have the force and effect of law and are clearly not binding on a court); *Stephens v. Dept. of State Police*, 271 Or. 390, 394, 532 P.2d 788 (1975) (Attorney General's opinions are not even persuasive authority to the extent they conflict with the statutes enacted by the legislature).

Equally important, for petitioner to have relied on the appellate court briefing in *Nutbrown* requires petitioner to have ignored (unreasonably, we suggest) the more formal advice given by the Attorney General in contexts in which the State's legal position was more squarely on point. Contrary to petitioner's contentions, the Attorney General has advised state agencies for almost sixty years that the invalidation refund statutes apply when a tax law is stricken by the courts. Petitioner and TROA suggest that a formal opinion of the Attorney General (19 Op. Att'y Gen. 577 (1940), reproduced at Pet. Cert. 43a through 46a) states that the general refund statutes apply when a tax law is invalidated.

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[17]That is, petitioner makes no overture towards representing that he in fact was aware of the contents of the State's brief in *Nutbrown*, a case in which petitioner was not a party, or that he actually relied on those contents.

As explained earlier in footnote 6, however, that opinion was issued in response to *Meredith v. State Tax Comm'n.* When the Attorney General opined that "[b]ecause of its limited application [the invalidation refund statutes do] not seem material in this connection," Pet. Cert. 43a–44a, he was merely noting that no law had been invalidated in *Meredith*. The other general language of that opinion on which petitioner relies, Pet. Cert. 12–13, is equally silent on the subject of the effects of invalidating a tax law. More pertinent guides to the Attorney General's consistent position are an opinion issued before the one on which petitioner relies and another issued in 1989 after *Davis* was announced. In 1936 the Attorney General stated: "Chapter 337, Oregon Laws 1931, [predecessor to the current version of the invalidation refund statutes] provides for the refunding of taxes collected by the state under any law, or parts thereof, declared to be invalid by the court of last resort, and appropriates the amounts necessary to cover such refunds." 17 Op. Att'y Gen. 805, 807 (1936). In 1989, after this Court's decision in *Davis*, the President of the Oregon Senate and the Speaker of the House of Representatives asked the Attorney General about its effects on the State. With respect to the State's liability for refunds, the Attorney General advised: "[OR. REV. STAT. §] 305.765 governs refunds based on the invalidity of a statute under which a tax was paid." Oregon Letter of Advice to Senate President John Kitzhaber and House Speaker Vera Katz OP-6320 at 14 (May 10, 1989).

Finally, petitioner relies on DOR's pre-1992 lack of reference to the invalidation refund statutes in the materials it prepared in carrying out its responsibility to inform the public about paying taxes and obtaining refunds. Pet. Cert. 15. Consistent with his overall thesis, petitioner apparently seeks to suggest that DOR did not mention those statutes because they cannot reasonably be

read to apply. That objection is met by the Oregon Supreme Court's exacting explanation of why they do. That said, some reasonable person might contend, in hindsight, that DOR would have done better to include reference to those laws. It is understandable, however, why it did not. The invalidation refund statutes do not create a procedure by which taxpayers *claim* refunds; they create an obligation on the State to *pay* refunds after a specified event occurs. Under those statutes, a taxpayer does not file for a refund in the same way that he or she might for refund of a general overpayment. Instead, the taxpayer must file an action in which the statute can be declared invalid. Relief then flows as a matter of remedy to all affected taxpayers. No claim for a refund must be made and, therefore, it would make little sense for DOR to advise taxpayers how to process such a non-claim. Moreover, unless petitioner intends to suggest that the invalidation refund statutes have no possible application, DOR's lack of reference is necessarily ambiguous. Finally, the invalidation of a tax law, which is the only event triggering the application of those statutes, is infrequent enough to cast doubt on the utility of including a reference to them in material designed for the average taxpayer.

In summary, petitioner may claim to have relied on prior cases, on the decision in *Nutbrown v. Munn*, on the positions articulated by the Oregon Attorney General's office, and on DOR's materials. That reliance, however, was not justifiable, both because none of those should have served to mislead petitioner in the first place, and because in any event, none of them excuse petitioner from consulting the statutes themselves. As important, however, petitioner's purported "reliance" here should be beside the point, because this case is not analogous to the circumstances presented in *Reich*. Unlike Georgia, Oregon

has a pre-existing, backward-looking refund statute that controls the availability of refunds. Also unlike *Reich*, no Oregon federal retiree was duped into giving up the process for obtaining a refund, nor has any federal retiree claimed that he or she has been denied an actual refund. The only objection here is that federal retirees did not get the remedy they preferred. Those facts alone distinguish this case from *Reich* and bring it instead squarely within the holding in *McKesson*.

CONCLUSION

The Court should deny the petition for certiorari.

Respectfully submitted,

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